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BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER	)))))	Finance Docket No. 35504

OPENING COMMENTS OF DYNO NOBEL INC.

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Dated: January 25, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER	)))))	Finance Docket No. 35504

OPENING COMMENTS OF DYNO NOBEL INC.

PREFACE

Dyno Nobel Inc. ("DNI") submits these Opening Comments in response to the Surface Transportation Board's December 12, 2011 Decision instituting a proceeding concerning Union Pacific Railroad Company's request for a declaratory order regarding Items 50 and 60 of UP Tariff 6607, "General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad." DNI also supports the opening comments being submitted on this date by its trade association, The Fertilizer Institute, along with the American Chemistry Council, The Chlorine Institute, and the National Industrial Transportation League.

These opening comments consist of the accompanying Verified Statement of Sandy Rudolph, Senior Director, AN Supply Chain, of DNI, along with Counsel's legal argument.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35504

Union Pacific Railroad Company –
Petition for a Declaratory Order

VERIFIED STATEMENT OF
SANDY RUDOLPH

My name is Sandy Rudolph and my business address is 2795 East Cottonwood Parkway, Suite 500, Salt Lake City, Utah 84121. I am Senior Director, AN Supply Chain, for Dyno Nobel Inc. ("DNI"). My current responsibilities include managing the acquisition of transportation for the movement of raw materials to and products from DNI's manufacturing facilities.

DNI – Overview/Rail Transportation Requirements

DNI is a leading manufacturer and supplier of industrial explosives and agricultural fertilizers, headquartered in Salt Lake City, Utah. DNI employs over 3,500 people and has 36 manufacturing and operations facilities in North America. The basic and essential raw material required for the production of ammonium nitrate used to manufacture industrial explosives and nitrogen fertilizers is anhydrous ammonia. DNI has been involved in the explosives products business for approximately 150 years, and traces its roots back to Alfred Nobel, who invented dynamite and the detonator in the mid-1800s. Today, most commercial explosives contain ammonium nitrate in some

form: ammonium nitrate is a key ingredient of the most commonly used explosives, and there are no practical alternatives to ammonium nitrate in the industrial explosives markets used for mining and quarrying (and to a lesser degree, in construction) due to the product's cost effectiveness and safety record as compared with other explosives.

DNI's four United States ammonium nitrate production facilities collectively consume approximately 635,000 tons of anhydrous ammonia annually as a feedstock. While its anhydrous ammonia requirements are met through various supply sources, including some of which DNI produces itself, the majority of its United States domestic needs are met from sources in the Gulf Coast. This region is one of the largest sources of production capacity for anhydrous ammonia in the United States due to the available large reserves of natural gas, the dominant production raw material, and the availability of pipeline transportation, which provides one of the lowest cost, most reliable sources of transportation. However, only DNI's Louisiana, Missouri facility is served by pipeline, and thus DNI requires alternative transportation arrangements to serve other of its facilities.

The primary transportation modes by which DNI receives inbound anhydrous ammonia to its ammonium nitrate production facilities in the United States are as follows:

Plant	Primary Transportation Mode(s)
Cheyenne, WY	Rail
Louisiana, MO	Pipeline
Donora, PA	Barge/Rail

DNI's Cheyenne, WY plant is not served by pipeline or barge, so DNI is reliant on railroad service to meet the anhydrous ammonia transportation needs of that facility.

DNI's Cheyenne facility is DNI's largest plant in the United States. This facility has been expanded in recent years to meet the growing needs for explosives, mainly in the nearby Powder River Basin ("PRB") coal fields, and also to meet the agricultural demands for nitrogen fertilizers. PRB coal remains the single largest source of coal fuel used in the production of electricity in the United States and the PRB mines require large amounts of industrial explosives for coal mining production purposes. DNI's Cheyenne plant is the nearest and lowest-cost facility manufacturing industrial mine explosives distributed in the PRB.

The key building block for the nitrogen fertilizers is anhydrous ammonia. DNI's Cheyenne plant produces approximately 250,000 tons per year of essential fertilizer products used by farmers to grow agricultural crops.

DNI's Cheyenne plant (served by the Union Pacific Railroad Company ("UP")) receives approximately 120,000 tons of anhydrous ammonia per year by rail. DNI's Donora, PA plant requires rail to supplement its current barge deliveries, and it receives approximately 10,000 tons of anhydrous ammonia by rail annually.

Traditional Railroad Indemnification Terms

For as long as railroads have been in existence as common carriers, DNI has been utilizing them, and relying on them to move its bulk raw commodities and products. DNI's core explosives business in the United States has been using anhydrous ammonia, a toxic by inhalation hazardous material ("TIH"), in the manufacture of

industrial explosives for 50 years or more, and DNI's ammonium nitrate-based fertilizers have been produced for a similar amount of time. During this time, the railroads' pricing arrangements have always contained straight-forward, bi-lateral indemnification agreements – until recently with the UP's unprecedented new tariff provisions that are the subject of this proceeding.

Under traditional, bi-lateral indemnity arrangements commonly used by railroads and shippers applying on all commodities (TIH or otherwise), generally each party has agreed to indemnify one another from and against liability resulting from acts or omissions of each party (*i.e.*, from each other's negligence), with liability in the event of any third party fault, joint negligence, etc. determined under governing negligence/tort law principles. Under these standard arrangements, a shipper has not been obligated to indemnify a railroad for anything beyond the shipper's own negligence.

For example, if a shipper has responsibility for and negligently seals a tankcar, which negligence leads to a cargo accident/spill en route, and liability is imposed on the involved railroad provider, then the shipper could be subject to an indemnity claim by the involved railroad. Likewise, if a railroad negligently inspects a train's brakes, which negligence leads to an accident/spill en route, and liability is imposed on the involved shipper, then the railroad could be subject to an indemnity claim by the involved shipper. If a third party were deemed at fault, and negligence/fault was not assigned to either party, then each party would be responsible for their own costs, fines, expenses, etc. resulting from any resulting litigation.

These types of bi-lateral indemnifications have worked well for both railroads and shippers and have not created any commercial disruptions for DNI or implicated state laws (*e.g.*, laws prohibiting as a matter of public policy indemnification agreements that unfairly assign responsibilities). DNI is unaware of a railroad and DNI ever having a major dispute under these standard indemnity provisions in the past.

The Serious Concerns Presented by UP's Indemnity/Liability Tariff

DNI is extremely concerned about UP's new and unprecedented tariff indemnification provisions. DNI finds unacceptable UP's language that requires customers to indemnify UP against any and all liabilities, except those caused by the sole or concurring negligence or fault of UP. The UP tariff language simply goes too far and abruptly departs from DNI's longstanding history of negotiating mutually beneficial, standard bi-lateral indemnification arrangements with its railroad service providers.

Among other things, this language could potentially subject DNI to unreasonable liability risk should accidents occur that are caused by an unknown cause, by a third party not having a contractual or other relationship with either UP or DNI, by UP's other customers' railcars that are present on the same train, by events not involving the release of TIH from a tankcar, or even by events that may be under the control of or caused by UP, but where UP does not accept that it has acted negligently or is at fault (*e.g.*, where UP is found in violation of federal safety standards, but where UP still disputes that the violation is caused by its negligence or fault). At a very minimum, DNI could be thrust into myriad and extended litigation in which it is not at fault in any way.

UP's tariff indemnity provision, if upheld, will have serious impacts on DNI. As discussed above, DNI relies on UP to move anhydrous ammonia to its plants as a primary feedstock. DNI has no control over UP or its operations on UP's private railroad system, or in choosing the routes, the means, or the people that are used in transporting DNI's commodities and products shipped by rail. The railroads have exclusive control over their systems, over the trains and railcars moving in railroad service, and over rail system safety compliance matters. Yet UP's tariff still demands that TIH shippers indemnify UP against liabilities even where the TIH shipper is not at fault and has no ability to control railroad operations, systems or safety.

DNI is aware that the railroads have emphasized in testimony to the STB the difficulty that railroads have in obtaining insurance (covering TIH movements or otherwise), and that no United States domestic insurance company will currently insure railroads, requiring railroads to go oversees to obtain necessary insurance. Clearly railroad customers such as DNI that are one step removed from rail transportation, with no control over the transportation and railroad systems, would face virtually insurmountable obstacles in obtaining insurance to cover UP's tariff indemnity provisions. In this respect, it is DNI's understanding at this time that it would be difficult, if not impossible, at reasonable costs to obtain insurance to cover the indemnity provisions of the UP tariff. This matter is a serious one and potentially puts in serious jeopardy DNI's ability to move an essential business commodity by rail.

DNI is also very concerned that the abrupt indemnification changes being sought by UP have been thrust on shippers in an attempt by UP to overcome the STB's

2009 decision in STB Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order* which reaffirmed that railroads have a responsibility to move TIH commodities as part of their common carrier obligation. UP issued its new indemnity tariff language shortly following that decision, and has recently been attempting to insert this indemnification language into DNI's transportation contracts as a largely non-negotiable term.

This situation is not a matter of only a few shippers being impacted. It is clear that UP is attempting to impose its onerous indemnity provisions on all of its TIH customers, and the likely impact is that other carriers will seek to follow UP's lead if UP is successful in implementing these provisions. DNI requires the railroads to move its essential business products, and the railroads clearly have one-sided bargaining power with DNI and other TIH shippers who require railroad service to meet their business needs.

Conclusion

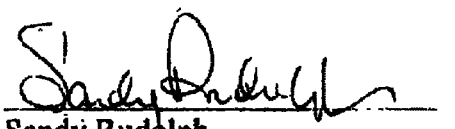
UP's tariff indemnification language presents a significant shift in shipper-carrier relations, and implicates major policy and safety issues. DNI relies on UP to move its essential business products, and DNI submits that the traditional, bi-lateral liability indemnification provisions that have worked well for the parties for many years should not be allowed to be overturned unilaterally by UP.

UP has had a commendable safety record in moving DNI's products, and DNI is committed to continuing to work with UP cooperatively in ensuring the safe and efficient movement of its commodities and business products. Promoting safety, health

and environment performance are core values of DNI. DNI respectfully submits that the best way to ensure the safe and reliable movement of its products is by the parties working together, and not through the imposition by one party of one-sided indemnification provisions.

VERIFICATION

I, Sandy Rudolph, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.



Sandy Rudolph

Executed on January 24, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER	)))))	Finance Docket No. 35504

LEGAL ARGUMENT

The Surface Transportation Board's ("STB" or "Board") December 12, 2011 Decision ("Board Decision") states that the Board has instituted this proceeding to "remove the uncertainty . . . regarding the reasonableness" of Items 50 and 60 of Union Pacific Railroad Company ("UP") Tariff 6607, "General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad" (hereinafter, "UP Indemnity Tariff"). *Id.* at 3.

UP's Petition for a Declaratory Order ("Petition") is simply the latest initiative by the railroads seeking to eliminate or substantially impede the common carrier obligation of railroads with respect to the transportation of toxic by inhalation hazardous materials ("TIH"). The Board has thus far wisely rejected all such efforts and it should do so again here. *See e.g. Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219 (STB served June 11, 2009) at 7 ("*UP Declaratory Order Decision*") (STB denies UP's request to be relieved from its obligation to quote common carrier rates and provide service for a TIH commodity); *Common Carrier Obligation of R.Rs. – Transp. of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served

Apr. 15, 2011) at 4 n.8 (STB denies the Association of American Railroad's request that the Board issue a policy statement addressing liability-sharing arrangements for the movement of TIH materials).

While UP offers up its Petition as a discrete dispute between it and one of its customers, clearly that is not the case, as this is a matter that UP has established in a general rules tariff presumably applicable to all TIH shippers, and UP has pressed this matter in contract negotiations with its TIH customers, including Dyno Nobel Inc. ("DNI"), as confirmed in the accompanying Verified Statement of Sandy Rudolph, Senior Director, AN Supply Chain for DNI ("V.S. Rudolph" at 6-7). UP's Petition has extremely broad implications, and given the repeated efforts of UP and the railroad industry seeking to be absolved from their common carrier obligation for the movement of TIH commodities, the UP Indemnity Tariff plainly is something which all carriers would likely want to pursue and adopt generally on all of their TIH traffic if given the opportunity to do so. *See id.* at 7.

In addition to the reasons for rejecting the UP Indemnity Tariff as set forth in the opening comments filed on this date by the American Chemistry Council, The Chlorine Institute, The Fertilizer Institute, and the National Industrial Transportation League, ("Interested Parties' Opening Comments") which DNI supports, DNI provides the following argument in opposition to the Tariff.

I.
UP Has Not Demonstrated A Valid Need for Its Attempted One-Sided Indemnification Terms

UP's new liability tariff states that UP will indemnify the shipper from liabilities arising where UP is "sole[ly]" negligent, and where there is concurring UP negligence with the shipper or another party, UP will be liable for its allocated percentage of responsibility. All other liabilities are the responsibility of the shipper.

The UP Indemnity Tariff seeks to overturn decades of established practice between carriers and shippers in successfully implementing bi-lateral indemnification arrangements. For example, DNI has been shipping by rail anhydrous ammonia to its manufacturing facilities for 50 years as an essential feedstock in the production of industrial explosives used for mining and quarrying and in the production of nitrogen-based agricultural fertilizers. V.S. Rudolph at 3-4. Those deliveries, until the recent introduction by UP of its new Indemnity Tariff, have always been subject to bi-lateral indemnity terms whereby a shipper is not obligated to indemnify a railroad for liabilities extending beyond the shipper's own negligence. *Id.* at 4. These traditional indemnification provisions have "worked well for both railroads and shippers" and have not created any major disputes. *Id.* at 5.

While shippers have no control over UP's private railroad system, its trains, and its operations, the UP Indemnity Tariff (at Item 50) still requires that TIH shippers indemnify UP against liabilities even where the TIH shipper is not at fault. *Id.* at 6. This is extremely problematic because shippers such as DNI "would face virtually insurmountable obstacles in obtaining insurance" to cover UP's Indemnity Tariff and "it

would be very difficult, if not impossible, at reasonable costs" to obtain insurance to cover the provisions of the UP Indemnity Tariff. This "potentially puts in serious jeopardy DNI's ability to move an essential business commodity by rail." *Id.*

It is clear that there is unequal bargaining power between railroads and shippers in the movement of TIH commodities. *Id.* at 7. ("the railroads clearly have one-sided bargaining power with DNI and other TIH shippers"). It thus appears that what UP is attempting to accomplish through this proceeding is to obtain Board assistance in creating a one-sided, federal indemnity standard that UP will then take and attempt to use to preempt common law claims brought in court by shippers challenging the UP indemnification terms as contrary to controlling state law and public policy. DNI respectfully submits that the governing tort and liability principles of each of the states should continue to apply, and that the Board should strongly resist UP's initiative in this far-reaching matter, in an area where the Board has little experience or expert knowledge.[1]

In its Petition, UP cites the sole hypothetical example of a tornado which hits a tank car, leading to a car puncture, causing the evacuation of a nearby community (or worse). UP Petition at 5. UP contends that UP would face potentially "staggering liabilities because of the inherently dangerous nature of TIH." *Id.* UP asserts that in such

[1] DNI also reiterates the statement in its May 17, 2011 comments filed in this docket (as also stressed in the Interested Parties' Opening Comments) that whether a particular indemnity/liability provision is valid or enforceable is a matter to be determined by the courts under appropriate state statutory or common law, and thus the issue of enforceability of the indemnity provisions raised by UP likely lies elsewhere.

instances, "it is reasonable for a TIH shipper . . . to indemnify UP against liabilities associated with those shipments that do not arise from UP's negligence." *Id.*

However, UP already is largely protected from such liability under the broad preemption provisions of federal law (at 49 U.S.C. § 20106), which provide that railroads are not liable at common law (including negligence suits) for accidents (including discharge of hazardous materials), when they are operating in accordance with governing federal safety standards.

The U.S. Department of Transportation ("USDOT") has developed and enforces a "comprehensive regulatory framework applicable to the rail transportation of hazardous materials" which program "serves to effectively mitigate the safety risk associated with the rail transportation of hazardous materials, including [T]IH materials." Comments of the United States Department of Transportation (filed Apr. 10, 2009) at 4, *Union Pac. R.R. Co. – Petition for Declaratory Order*, STB Finance Docket No. 35219 ("USDOT Comments").[2] UP and other railroads have been involved in numerous common law tort cases where they have relied on, and successfully invoked the federal preemption provisions of 49 U.S.C. § 20106 to obtain court judgments dismissing actions and absolving themselves from any tort liability.

[2] The Board has recognized that other federal agencies, including USDOT, the Federal Railroad Administration, and the Transportation Security Administration have been charged by Congress in the first instance with establishing and enforcing the comprehensive safety regulatory framework applicable to the rail transportation of TIH through an extensive set of rules and regulations designed to manage and mitigate the risks posed. *See UP Declaratory Order Decision* at 5 n.22.

In the hypothetical train accident example provided by UP involving a tornado, as long as UP was complying with the applicable federal safety standards involving the movement of the TIH commodities, it would be effectively immune from common law tort liability. Instead of implementing onerous, one-sided indemnity provisions "Congress has chosen to pass legislation that directs DOT and [the Department of Homeland Security] to safeguard the safety and security risks posed by the rail movement of [T]IH shipments, and that provides protection to railroads against tort suits when they comply with the Federal standards." USDOT Comments at 4.

II.
UP's Indemnity Tariff Unreasonably Impinges on the Railroad Common Carrier Obligation and Is Bad Policy

As USDOT has stressed, "only Congress, by the passage of legislation addressing the risks associated with the rail movement of [T]IH materials, can modify a common carrier's obligation to transport such materials." *Id.* at 4. Congress has not done that. What UP is really asking the Board to do here is to overturn and ignore longstanding precedent[3] and industry practice,[4] by permitting UP to impose unreasonable rules that would not further safe transportation service of TIH commodities (and in fact may further the opposite behavior). UP's attempt to do so through its Indemnity Tariff constitutes an unreasonable practice.

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[3] *See, e.g., Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920) ("tariff provisions which purport to state the law, fix limitations of the carriers' liability, or define the legal obligations of the parties are . . . generally objectionable").

[4] A carrier's common carrier obligations to move traffic are shaped by the long history of common carriage, as well as the continuing national need for such carriage. *See, e.g., Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1167 (6th Cir. 1979).

A. The Unreasonableness of UP's Indemnity Tariff is Demonstrated By Its Significant and Wide-Ranging Impacts

While the Board's Decision notes that, at least in some respects, the provisions of UP's Indemnity Tariff "are not as broad" as in the prior rail carrier initiative rejected by the Board in Ex Parte No. 677 (Sub-No. 1) (*id.* at 3 n.3), on close review, it is clear that the terms in UP's Indemnity Tariff are very expansive and just as unreasonable:

> Among other things, this language could potentially subject DNI to unreasonable liability risk should accidents occur that are caused by an unknown cause, by a third party not having a contractual or other relationship with either UP or DNI, by another customers' railcars that are present on the same train, by events not involving the release of TIH from a tankcar, or even by events that may be under the control of or caused UP, but where UP does not accept that it has acted negligently or is at fault (*e.g.*, where UP is found in violation of federal safety standards, but where UP still disputes that the violation is caused by its negligence or fault). At a very minimum, DNI could be thrust into myriad and extended litigation in which it is not at fault in any way.

V.S. Rudolph at 5. The UP Indemnity Tariff is unreasonable because it subjects shippers to unreasonable liability risk and "puts in serious jeopardy DNI's ability to move an essential business commodity by rail," and thus "simply goes too far." *Id.* at 7, 5.

Under the UP Indemnity Tariff, it is not hard to imagine numerous instances where a shipper could be forced into high-stakes litigation, even where the shipper is clearly not at fault, and even where responsibility has been assigned to the railroad. In fact, the three most recent prominent accidents involving the leakage of TIH materials from tank cars at Macdona, TX (2004), Graniteville, SC (2005), and Minot, ND (2002) all involved governmental findings of railroad fault. However, even in the face of

these findings, each of the involved railroads still disavowed any fault or responsibility in resulting civil litigation.

For example, in the Macdona, TX accident, on June 28, 2004, a westbound UP freight train, containing 74 cars, collided and struck the midpoint of a 123-car eastbound BNSF Railway freight train traveling on the same main line track as the BNSF train, and as the BNSF train was leaving the main line to enter a parallel siding. Both trains derailed. The UP train contained a pressure tank car loaded with liquefied chlorine. The chlorine tank car was punctured, and chlorine escaped from the punctured car. National Transportation Safety Board ("NTSB"), Railroad Accident Report, *Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailment and Hazardous Materials Release, Macdona, Texas (June 28, 2004)* ("*NTSB Macdona Report*").[5]

The NTSB conducted an extensive investigation of the Macdona, TX accident and issued a Report. In its Report, the NTSB made the unequivocal finding that "the crew of the accident Union Pacific Railroad train failed to operate their train in accordance with operating rules and in compliance with wayside signal indications, to include failing to take any action in response to the *stop* signal at the west end of the Macdona siding." *Id.* at 58. NTSB further concluded that the probable cause of the

[5] Three persons, including the UP train conductor, and two local residents died as a result of chlorine gas inhalation. Thirty individuals were treated for respiratory distress or other injuries related to the collision and derailment. Damages to rolling stock, track, and signal equipment were estimated at $5.7 million, with environmental cleanup costs estimated at $150,000. The punctured chlorine tank car was being shipped to Hasa, Inc., in Eloy, AZ. It had been loaded at Taft, LA, with 180,000 pounds of liquefied chlorine. *Id.*

accident was the failure of the UP crew to abide by the stop signal at the west end of the Macdona siding, likely caused by the UP train crew's fatigue, with the conductor of the UP train most likely asleep at the time of the incident. *Id.* at 59.[6]

Civil tort actions arose out of the Macdona train incident, raising claims against UP. In its answer in one representative action,[7] UP asserted numerous affirmative defenses disavowing any fault. *Id.* at 1-4.[8] Among its affirmative defenses, UP asserted the following:

- "The matters about which Plaintiffs complain were not proximately caused, in whole or in part, by any acts or omissions on the part of Union Pacific."

- "Union Pacific asserts that any injuries or damages sustained by Plaintiffs were caused by conditions or causes unrelated to this incident or were caused by the acts or omissions of third parties over whom this Defendant has no control."

- "Union Pacific asserts that any injuries or damages sustained by Plaintiffs may be the result of pre-existing conditions."

- "Union Pacific asserts that the matters complained of in Plaintiffs' pleadings were not the result of any negligence on the part of this Defendant, said matters were the result of an unavoidable accident insofar as this Defendant is concerned, and the jury should be allowed to pass on

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[6] The *NTSB Macdona Report* findings and cause excerpts are included hereto as *Counsel's Exhibit No. 1.*

[7] *Carolina Quintanilla, et al. v. Union Pac. R.R. Co.*, Civil Action No. SA-06-CA-0644-FB (W. Dist. Tex. 2006). UP's answer is included hereto as *Counsel's Exhibit No. 2* ("UP Macdona Answer").

[8] UP also asserted an affirmative defense claiming preemption of all claims based on federal preemption law, including 49 U.S.C. § 20106. UP Macdona Answer at 4.

whether this accident was one of those which are recognized as being unavoidable."

- "Union Pacific would show that if the Plaintiffs sustained any injuries as alleged, then said injuries occurred because of the acts or conduct of some third party or parties for which acts Union Pacific has no authority or control and from whom Union Pacific can have no responsibility of the fault, negligence, strict liability or omissions of others with substantial cause, in fact, to any party's damages and should operate to completely bar recovery against Union Pacific, or alternatively, reduce recovery on a comparative or contributory fault basis."

- "Union Pacific would show that the Plaintiffs' injuries, if any, were the result of Plaintiffs' own comparative fault or negligence."

- "Union Pacific denies that it is responsible for the alleged acts or omissions of its employees to the extent that the alleged acts or omissions of any Union Pacific employees were beyond the duties and scope of their employment to the extent that such alleged acts or omissions cannot impute liability on Union Pacific under *respondeat superior* or any other law or doctrine."

Id. at 1-3. What the Macdona, TX incident and resulting civil litigation instructs here is that, even in the face of an expert governmental finding of fault (*e.g.*, the *NTSB Macdona Report*), railroads can and will strongly disavow responsibility or liability in any civil litigation arising from train accidents. Under the UP Indemnity Tariff, this could and would likely cause shippers of TIH commodities to be subject to possible endless, disruptive, and expensive litigation in actions where they clearly should not be involved, and have not been involved in the past.[9] DNI respectfully submits that the Board should

[9] UP's Indemnity Tariff provides that the "Indemnified Party shall, at the expense of the Indemnifying Party, cooperate with and take all such actions as the Indemnifying

strongly reject UP's overtures that the STB assist UP in imposing an unprecedented and one-sided indemnity regime that could have wide-ranging effects and inappropriate consequences.

There are various other problems immediately apparent with the UP Indemnity Tariff including the following:

First, the tariff attempts to hold shippers responsible for "any failure of, release from, or defect in equipment tendered by customer," even where such failure, release, or defect is unrelated to the customer's negligence or failure in inspecting or maintaining the equipment prior to its release to UP. UP Indemnity Tariff, Item 50.2.

Second, the tariff attempts to hold shippers responsible for federal, state, or local environmental law fine, penalties, or actions, presumably even where the law already assigns strict liability on the carrier. *Id.* In this respect, it appears that UP is attempting to end run governing statutes and assign responsibility to shippers where legislators have already assigned responsibility to carriers.

Third, in the event of joint liability, the UP Indemnity Tariff provides an involved and unprecedented contribution mechanism whereby a jury/judge must determine percentage of responsibility for the involved railroad, customer, and any other involved party, with the railroad "liable only for the amount of such *liabilities* allocated to the railroad in proportion to railroad percentage of responsibility" and with railroad customers liable for all other liabilities. *Id.*, Item 60. What this item appears to be is a

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party may reasonably requires to assist the Indemnifying Party in the investigation and defense of the Indemnified Matter." *Id.* at Item 50.3.

thinly-veiled attempt by UP to side-step liability assignments established under long-standing statutory or common law principles established in each state,[10] and in their place, create a Board-approved, federal contribution standard. The Board should reject UP's attempt to establish one-sided contribution formula that is contrary to state laws.

CONCLUSION

DNI appreciates the opportunity to file these opening comments. DNI respectfully submits that traditional indemnity/liability provisions have served railroads and their customers well and have not resulted in any "staggering liability" on rail carriers requiring the type of dramatic, one-sided changes which UP seeks through its Indemnity Tariff. The UP Indemnity Tariff has potentially significant and far-reaching

[10] For example, in the Macdona, TX civil litigation matter discussed above brought prior to the implementation of UP's Indemnity Tariff, UP asked the court to declare, in the event of any judgment entered in the matter against UP, that UP "would be entitled to contribution as a matter of common law and statutory law, and pursuant to Chapters 32 and 33 of the TEXAS CIVIL PRACTICE & REMEDIES CODE, for any and all sums, which Union Pacific may be compelled to pay any other party in this cause." UP Macdona Answer at 3-4.

adverse consequences, is contrary to the public interest, and should be rejected by the Board.

Respectfully submitted,

DYNO NOBEL INC.

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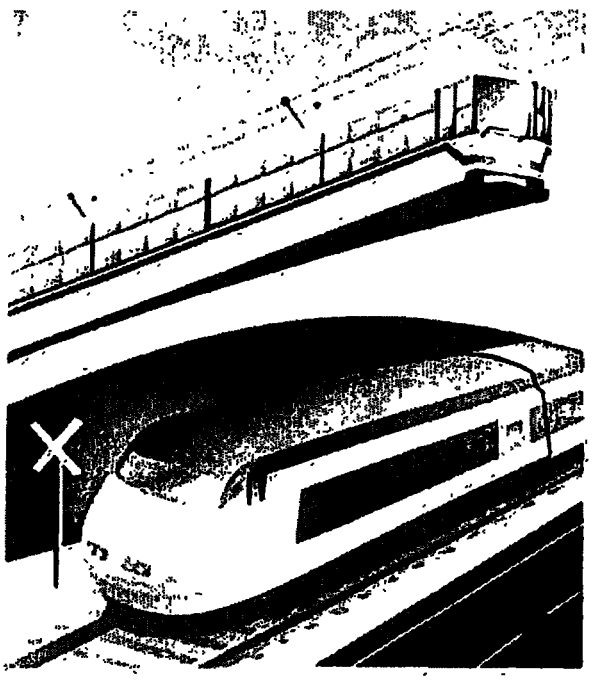
Dated: January 25, 2012

Attorneys for Dyno Nobel Inc.

COUNSEL'S EXHIBIT NO. 1

Counsel's Exhibit No. 1

Collision of Union Pacific Railroad Train MHOTU-23 With BNSF Railway Company Train MEAP-TUL-126-D With Subsequent Derailment and Hazardous Materials Release Macdona, Texas June 28, 2004



Railroad Accident Report

NTSB/RAR-06/03

PB2006-916303
Notation 7675D

National Transportation Safety Board
Washington, D.C.

Conclusions

Findings

1. On the day of the accident, the crew of the accident Union Pacific Railroad train failed to operate their train in accordance with operating rules and in compliance with wayside signal indications, to include failing to take any action in response to the *stop* signal at the west end of the Macdona siding.

2. The following were neither causal nor contributory to the accident: weather conditions, signal operation, equipment performance, track condition, drug use, or crew training and qualifications.

3. The Union Pacific Railroad engineer's combination of sleep debt, disrupted circadian processes, limited sleep through the weekend, and long duty tours in the days before the accident likely caused him to start the accident trip with a reduced capacity to resist involuntary sleep.

4. The Union Pacific Railroad conductor's lack of sufficient rest before reporting to work, the disruption to his previous work/rest pattern that resulted from his change in work schedule, and his alcohol consumption on the evening before the accident likely combined to reduce his capacity to remain awake and alert during the accident trip.

5. Neither the engineer nor the conductor of the Union Pacific Railroad train made effective use of the time that was available to them, between the time they were released from their previous assignments and the time they were called for the accident trip, to obtain rest.

6. The engineer of the Union Pacific Railroad train likely experienced one or more periods of microsleep early in the accident trip, and these were probably followed by a deeper descent into sleep as the train traveled past the signal at the east end of the Macdona siding.

7. The conductor of the Union Pacific Railroad train was most likely asleep during much of the accident trip.

8. Even though the initial dispatch of emergency response resources to the accident was timely, the overall execution of the incident command process during the response effort was not timely, effective, or appropriate.

9. The chlorine tank car that released a portion of its load in this accident was punctured during the derailment by impact with the left side frame member of the flatcar loaded with steel plates that was four cars ahead of the chlorine car in the train.

10. The shell of the punctured chlorine tank car in this accident would have been susceptible to catastrophic fracture if it had experienced a large penetration of several feet or more.

11. The unpredictability of their work schedules may have encouraged the Union Pacific Railroad engineer and conductor to delay obtaining rest in the hope that they would not be called to work until later on the day of the accident.

12. Limbo time, which is limited neither by Federal regulation nor railroad operating rules, could be a factor in crewmember fatigue in that required rest periods do not take into account the extended hours of wakefulness before the rest period begins.

13. The Macdona, Texas, accident is another in a long series of railroad accidents that could have been prevented had there been a positive train control system in place at the accident location.

Probable Cause

The National Transportation Safety Board determines that the probable cause of the June 28, 2004, collision of Union Pacific Railroad train MHOTU-23 with BNSF Railway Company train MEAP-TUL-126-D at Macdona, Texas, was Union Pacific Railroad train crew fatigue that resulted in the failure of the engineer and conductor to appropriately respond to wayside signals governing the movement of their train. Contributing to the crewmembers' fatigue was their failure to obtain sufficient restorative rest prior to reporting for duty because of their ineffective use of off-duty time and Union Pacific Railroad train crew scheduling practices, which inverted the crewmembers' work/rest periods. Contributing to the accident was the lack of a positive train control system in the accident location. Contributing to the severity of the accident was the puncture of a tank car and the subsequent release of poisonous liquefied chlorine gas.

COUNSEL'S EXHIBIT NO. 2

Counsel's Exhibit No. 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
JURY

CAROLINA QUINTANILLA, DIANA HERNANDEZ, VICTORIA I. CHINCARINI, FLORA TAVERA, EZEQUIEL RAMOS, EVA L. GARCIA, RAMONA ENRIQUEZ, JOSEPHINE MARTINEZ, AS NEXT FRIEND OF PAUL A. CORONADO, SAM ESTRADA, BERNARDO CASTILLO, AND LEROY SANCHEZ, JR.	§	**CIVIL ACTION NO. SA-06-CA-0644-FB**
VS.	§	
UNION PACIFIC RAILROAD COMPANY	§	

UNION PACIFIC RAILROAD COMPANY'S ORIGINAL ANSWER

Defendant UNION PACIFIC RAILROAD COMPANY ("Union Pacific") files this Original Answer pursuant to Rule 12 of the Federal Rules of Civil Procedure and in support of its Answer would show the Court as follows:

AFFIRMATIVE DEFENSES:

I.

Union Pacific asserts that Plaintiffs' complaint fails to state a claim upon which relief can be granted.

II.

The matters about which Plaintiffs complain were not proximately caused, in whole or in part, by any acts or omissions on the part of Union Pacific.

III.

Union Pacific asserts that any injuries or damages sustained by Plaintiffs were caused by conditions or causes unrelated to this incident or were caused by the acts or omissions of third parties over whom this Defendant has no control.

IV.

Union Pacific asserts that Plaintiffs failed to mitigate their damages.

V.

Union Pacific asserts that any injuries or damages sustained by Plaintiffs may be the result of pre-existing conditions.

VI.

Union Pacific asserts that the matters complained of in Plaintiffs' pleadings were not the result of any negligence on the part of this Defendant, said matters were the result of an unavoidable accident insofar as this Defendant is concerned, and the jury should be allowed to pass on whether this accident was one of those which are recognized as being unavoidable.

VII.

Union Pacific would show that if the Plaintiffs sustained any injuries as alleged, then said injuries occurred because of the acts or conduct of some third party or parties for which acts Union Pacific has no authority or control and from whom Union Pacific can have no responsibility of the fault, negligence, strict liability or omissions of others with substantial cause, in fact, to any party's damages and should operate to completely bar recovery against Union Pacific, or alternatively, reduce recovery on a comparative or contributory fault basis.

VIII.

Union Pacific would show that the Plaintiffs' injuries, if any, were the result of Plaintiffs' own comparative fault or negligence.

IX.

Union Pacific denies that it is responsible for the alleged acts or omissions of its employees to the extent that the alleged acts or omissions of any Union Pacific employees were beyond the duties and scope of their employment to the extent that such alleged acts or omissions cannot impute liability on Union Pacific under *respondeat superior* or any other law or doctrine.

X.

Defendant Union Pacific asserts that any railroad equipment complained of by the Plaintiffs was operated by a common carrier subject to the Interstate Commerce Act and was operated on a railroad right of way.

XI.

Defendant Union Pacific would show that it is entitled to a credit and/or offset for any monies paid in settlement by any party or non-party to this lawsuit.

XII.

Defendant Union Pacific denies that the occurrence made the basis of this action was caused by the negligence or fault, if any, of Union Pacific. Union Pacific would ask that the causation attributable to all persons, entities, and products be compared in determining the liability, if any, for the occurrences and damages claimed by any party to this lawsuit. Union Pacific, therefore, would show the Court that if any judgment is entered in this cause against Union Pacific on any grounds, which liability is expressly denied,

it would be entitled to contribution as a matter of common law and statutory law, and pursuant to Chapters 32 and 33 of the TEXAS CIVIL PRACTICE & REMEDIES CODE, for any and all sums, which Union Pacific may be compelled to pay any other party in this cause, as well as reasonable and necessary costs in defending this action.

XIII.

Union Pacific asserts that some, if not all, of Plaintiffs' claims are pre-empted by Federal Law, including but not liited to the Hazardous Materials Transportation Act ("HMTA"), the Federal Railroad Safety Act ("FRSA"), their subparts and associated statutes and regulations..

UNION PACIFIC'S ANSWERS TO PLAINTIFFS' COMPLAINT:

In response to the specific numbered paragraphs of the Original Complaint filed by Plaintiffs, Defendant Union Pacific Railroad Company would show as follows:

1. Defendant Union Pacific Railroad Company denies the factual allegations of paragraph 1.1 for want of sufficient knowledge or information to for a belief as to their truth.

2. Defendant Union Pacific Railroad Company denies the allegations of paragraph 2.1 with respect to the residency of Plaintiffs for want of sufficient knowledge or information to for a belief as to their truth. Union Pacific admits to the allegations of paragraph 2.1 with respect to service of process upon Defendant Union Pacific Railroad Company.

3. Defendant Union Pacific Railroad Company admits that paragraph 2.2 alleges diversity.

4. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.1.

5. Defendant Union Pacific Railroad Company denies the residency allegations of paragraph 3.2, on which venue is based.

6. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.3 with respect to defending lawsuits over the same event in State courts. Defendant Union Pacific Railroad Company denies the allegations of paragraph 3.3 with respect to defending lawsuits over the same event in Federal courts.

7. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.4.

8. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.5.

9. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.6.

10. Defendant Union Pacific Railroad Company can neither admit nor deny the allegations of paragraph 3.7 because they are vague.

11. Defendant Union Pacific Railroad Company denies the allegations of paragraph 3.8 with respect to Defendant's liability, if any.

12. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 3.9.

13. Defendant Union Pacific Railroad Company denies the allegations of paragraph 3.10.

14. Defendant Union Pacific Railroad Company denies the allegations of paragraph 3.11 except that Union Pacific Railroad Company is accepting service in this suit.

15. Defendant Union Pacific Railroad Company denies the allegations of paragraph 4.1 for want of sufficient knowledge or information to form a belief as to their truth.

16. Defendant Union Pacific Railroad Company denies the allegations of paragraph 4.2 for want of sufficient knowledge or information to form a belief as to their truth.

17. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1 for want of sufficient knowledge or information to form a belief as to their truth.

18. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(i).

19. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(ii).

20. Defendant Union Pacific Railroad Company admits to the allegations of paragraph 5.1(iii) to the extent that its train's brakes were not applied prior to the collision. Defendant Union Pacific Railroad Company denies all other allegations of paragraph 5.1(iii) for want of sufficient knowledge or information to form a belief as to their truth.

21. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(iv).

22. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(v).

23. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(vi).

24. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(vii).

25. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(viii) for want of sufficient knowledge or information to form a belief as to their truth.

26. Defendant Union Pacific Railroad Company admits that its employees, specifically the train crew, failed to place the train into emergency mode as stated in paragraph 5.1(ix). Defendant Union Pacific Railroad Company denies all other allegations of paragraph 5.1(ix), specifically the "by and through" claim, for want of sufficient knowledge or information to form a belief as to their truth.

27. Defendant Union Pacific Railroad Company denies the allegations of paragraph 5.1(x) for want of sufficient knowledge or information to form a belief as to their truth.

28. Defendant Union Pacific Railroad Company admits that it employed Arturo Cadena, Jr. and Heath Pape as stated in paragraph 6.1. Defendant Union Pacific Railroad Company denies the remaining allegations of paragraph 6.1 for want of sufficient knowledge or information to form a beleif as to their truth.

29. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2 for want of sufficient knowledge or information to form a belief as to their truth. Defendant Union Pacific Railroad Company specifically denies any allegation of gross negligence.

30. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(i) for want of sufficient knowledge or information to form a belief as to their truth.

31. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(ii) for want of sufficient knowledge or information to form a belief as to their truth.

32. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(iii) for want of sufficient knowledge or information to form a belief as to their truth.

33. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(iv) for want of sufficient knowledge or information to form a belief as to their truth.

34. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(v).

35. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(vi) for want of sufficient knowledge or information to form a belief as to their truth.

36. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(vii) for want of sufficient knowledge or information to form a belief as to their truth.

37. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.2(viii) for want of sufficient knowledge or information to form a belief as to their truth.

38. Defendant Union Pacific Railroad Company denies the allegations of paragraph 6.3.

39. Defendant Union Pacific Railroad Company denies the allegations of paragraph 7.1.

40. Defendant Union Pacific Railroad Company denies the allegations of paragraph 8.1.

41. Defendant Union Pacific Railroad Company denies the allegations of paragraph 9.1.

42. Defendant Union Pacific Railroad Company denies the allegations of paragraph 10.1.

43. Defendant Union Pacific Railroad Company denies the allegations of paragraph 11.1.

44. Defendant Union Pacific Railroad Company denies the allegations of paragraph 12.1.

45. Defendant Union Pacific Railroad Company denies the allegations of paragraph 13.1.

46. Defendant Union Pacific Railroad Company denies the allegations of paragraph 14.1.

47. Defendant Union Pacific Railroad Company denies the allegations of paragraph 15.1.

48. Defendant Union Pacific Railroad Company denies the allegations of paragraph 16.1.

49. Defendant Union Pacific Railroad Company denies the allegations of paragraph 17.1.

50. Defendant Union Pacific Railroad Company denies the allegations of paragraph 18.1.

51. Defendant Union Pacific Railroad Company denies the allegations of paragraph 19.1 for want of sufficient knowledge or information to form a belief as to their truth or Plaintiffs' right to recover.

52. Defendant Union Pacific Railroad Company can neither admit nor deny the allegations of paragraph 20.1.

PRAYER

Defendant Union Pacific prays that Plaintiff take nothing by reason of this suit and for all relief to which it may show itself justly entitled.

Respectfully submitted,

NEWMAN FAVALORO & TROEGEL

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Union Pacific Railroad Company's Original Answer was served on this the 28th day of September, 2006, to all counsel of record.

Alfonso Nevarez
Chapa & Nevarez, P.C.
120 Villita Street
San Antonio, Texas 78205

_____
Deborah A. Newman

CERTIFICATE OF SERVICE

I hereby certify that this 25th day of January, 2012, I have caused copies of the forgoing to be served via first-class mail, postage prepaid upon all parties of record to this proceeding.

Peter A. Pfohl